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No. 89-453

In the Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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20 pp

QUESTION PRESENTED

Whether the Federal Communications Commission's policy of awarding a qualitative enhancement for minority ownership in comparative license proceedings violates the equal protection component of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 873 F.2d 347; the orders filed on the denial of the petition for rehearing and suggestion of rehearing en banc (Pet. App. 96a-97a, 98a-99a) are unreported. The memorandum opinion and order of the Federal Communications Commission granting the license application to petitioner's competitor (Pet. App. 60a-63a) is unreported. The memorandum opinions and orders of the Federal Communications Commission on remand from the court of appeals (Pet. App. 48a-51a, 52a-57a) are reported at 3 F.C.C. Rcd 866 and 2 F.C.C. Rcd 1474, respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1989. A petition for rehearing was denied on June 21, 1989. Pet. App. 96a-97a. The petition for a writ of certiorari was filed on September 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Background

1. *Comparative Licensing Proceedings*

In the Communications Act of 1934, Congress assigned to the Federal Communications Commission the exclusive authority to grant licenses to build and operate radio and television stations in the United States. See 47 U.S.C. 151, 301, 303, 307. In comparative proceedings, the Act calls for the FCC to make television and radio licensing decisions in accord with the "public convenience, interest, or necessity." 47 U.S.C. 303. The Commission, under that statutory mandate, has long identified two interrelated objectives for selecting qualified applicants: the "best practicable service to the public" and a "maximum diffusion of control of the media of mass communications," commonly referred to as diversification, in order to maximize diversity of programming. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965) [hereinafter *1965 Policy Statement*]; see also *Cleveland Television Corp.* v. *FCC*, 732 F.2d 962, 972 (D.C. Cir. 1984).

In comparative licensing proceedings, the FCC weighs both "quantitative" and "qualitative" attributes of competing applicants.[1] Pet. App. 4a. The quantitative assessment generally rests on each applicant's proportional integration of ownership into management ("best practicable service") and each applicant's other media holdings ("diversification"). The FCC has made clear that participation in station management by owners is a factor of "substantial importance" in determining which applicant is superior under the best practicable service objective. *1965 Policy Statement*, 1 F.C.C.2d at 395.[2] If one applicant has a clear quantitative advantage, then that applicant will receive the license if he is otherwise qualified. See generally Pet. App. 4a; *WHW Enterprises, Inc.*, 89 F.C.C.2d 799, 819 (Rev. Bd. 1982), review denied, FCC No. 83-368 (Sept. 15, 1983), aff'd in part and rev'd in part on other grounds, 753 F.2d 1132 (D.C. Cir. 1985); *1965 Policy Statement*, 1 F.C.C.2d at 395.

If there are no appreciable quantitative differences among the applicants, the FCC then assesses each applicant's relative strengths on a variety of "qualitative" factors, which include local residence, participation in civic activities, past broadcast experience, and race and gender of the owner. See Pet. App. 4a; *TV 9, Inc.* v. *FCC*, 495 F.2d 929, 941 & n.2 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974); WPIX, Inc., 68 F.C.C.2d 381, 411-412 (1978); *1965 Policy Statement*, 1 F.C.C.2d at 395-396. Such qualitative enhancements, however, may not over-

[1] As a threshold matter, the FCC determines whether any applicant merits a preference for providing first or second local service to a community. See 47 U.S.C. 307(b). If one applicant receives a Section 307(b) preference, then that applicant generally will prevail without a comparative hearing. See *WHW Enterprises, Inc.* v. *FCC*, 753 F.2d 1132, 1135 (D.C. Cir. 1985).

[2] Other factors, such as proposed program service, past broadcast record, and efficient use of the frequency, may also play a role in determining which applicant will provide the best practicable service. *1965 Policy Statement*, 1 F.C.C.2d at 397-399.

come clear quantitative differences among applicants. See *WHW Enterprises, Inc.*, 89 F.C.C.2d at 817.

2. *Development of the FCC's Minority Ownership Policies*

As originally conceived and implemented under the *1965 Policy Statement*, the FCC's selection criteria for comparative licensing proceedings were race-neutral.[3] In 1973, however, the District of Columbia Circuit concluded that there was a dearth of minorities in broadcasting and that promoting greater minority ownership in the broadcasting industry would foster program diversity. The court of appeals therefore directed the Commission to give some "favorable consideration" to an applicant who proposes to include racial minorities among its owners who will participate in managing the station. *TV 9, Inc.* v. *FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974); see *id.* at 935-938; *id.* at 941-942 (supplemental opinion of Fahy, J.).[4] Accord *Garrett* v. *FCC*, 513 F.2d 1056, 1062-1063 (D.C. Cir. 1975).[5]

[3] During the late 1960s, the FCC had addressed the problem of racial discrimination in licensees' employment practices. See generally *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969).

[4] The court of appeals stated that

> when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded. The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news.

495 F.2d at 938 (footnotes omitted).

[5] The *Garrett* court stated that "[t]he entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that 'reasonable expectation,' without 'advance demonstration,' gives them relevance." 513 F.2d at 1063 (footnotes omitted).

As a result of the *TV 9* and *Garrett* decisions, together with its own studies, see, *e.g.*, *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 980-981 (1978) [hereinafter *1978 Policy Statement*]; Minority Ownership Task Force, FCC, *Report on Minority Ownership in Broadcasting* 1-3, 8-12, 30-31 (1978) [hereinafter *Task Force Report*], the FCC implemented a policy of awarding preferences in comparative proceedings for minority ownership. See *WPIX, Inc.*, 68 F.C.C.2d at 411-412; see also *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264 & n.13 (1982), aff'd *sub nom. West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985). The *Task Force Report* recounted that "[d]espite the fact that minorities constitute approximately 20 percent of the population, they control fewer than *one percent* of the 8500 commercial radio and television stations currently operating in this country." *Task Force Report* at 1 (emphasis in original). The Task Force viewed that "[a]cute underrepresentation of minorities among the owners of broadcast properties [as] troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience," *ibid.*, and found that "[u]nless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities," *ibid.*

The FCC credited these findings and, in calling for the awarding of minority enhancement credits in comparative licensing proceedings to remedy the "[a]cute underrepre-

sentation" of minorities in broadcasting, announced its commitment to the view that "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming * * *, [and that] an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum." *1978 Policy Statement*, 68 F.C.C.2d at 981. The Commission explained that because of

> the continuing underrepresentation of minorities in broadcast ownership, and because minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation, [the Commission concluded that] full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of ownership which are at the heart of the Communications Act and the First Amendment.

Waters Broadcasting Corp., 91 F.C.C.2d at 1264, 1265.[6]

[6] These findings also undergird other FCC policies designed to promote greater minority participation in broadcasting. Since 1978, the FCC has sought to increase minority participation in broadcasting by awarding tax certificates, *i.e.*, incentives, to station owners who sell facilities to minority-controlled applicants. See 26 U.S.C. 1071; *1978 Policy Statement*, 68 F.C.C.2d at 982-983. By statute, Congress has also directed the FCC to use minority preferences in the random assignment of certain low-power stations. See 47 U.S.C. 309(i)(3)(A).

Moreover, in 1978, the FCC adopted its "distress sale" program by which the Commission permits licensees, under certain circumstances, to sell stations to minority-controlled buyers at below market prices rather than risk revocation or denial of renewal of the license. *1978 Policy Statement*, 68 F.C.C.2d at 983. The District of Columbia Circuit recently struck down the FCC's minority distress sale program as unconstitutional. *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, 876 F.2d 902 (D.C. Cir. 1989) (per curiam), petition for cert. pending *sub nom. Astroline Communications Co.* v. *Shurberg Broadcasting of Hartford, Inc.*, No. 89-700. In a separate submission filed this date, the FCC has opposed the petition for a writ of certiorari filed by the unsuccessful license applicant in that case. We have provided a copy of that brief to counsel for petitioner in this case.

As applied in initial comparative licensing proceedings, minority ownership and participation in management is a "plus-factor [to be] weighed along with all other relevant factors in determining which applicant is to be awarded a preference" under the integration criterion. *TV 9, Inc.* v. *FCC*, 495 F.2d at 941 n.2.; see *WPIX, Inc.*, 68 F.C.C.2d at 411. The FCC awards credits to the extent that an individual minority owner will actively participate in the management of the station. See *TV 9, Inc.* v. *FCC*, 495 F.2d at 941; *WPIX, Inc.*, 68 F.C.C.2d at 411-412.

3. *Congressional Oversight of the FCC's Minority Ownership Policies*

In 1982, Congress amended the Communications Act of 1934 to authorize the FCC to award licenses under a random selection system, and directed the FCC, in creating any such lottery procedure, to grant "an additional significant preference * * * to any applicant controlled by a member or members of a minority group." 47 U.S.C. 309(i)(3)(A); see note 6, *supra*. Congress was aware that minorities "traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 44 (1982). Consequently, Congress was of the view that

> [o]ne means of remedying the past economic disadvantage to minorities which has limited their entry

> into * * * the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media * * *, is to provide that a significant preference be awarded to minority-controlled applicants in FCC licensing proceedings * * *.

Ibid.; see also H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981).

In 1987, in response to the FCC's initiation of inquiry proceedings to reconsider the appropriateness of its policies that seek to promote minority ownership in broadcasting, see pp. 12-13, *infra*, Congress enacted an appropriations provision that prohibited the Commission from spending any appropriated funds "to repeal, to retroactively apply changes in, or to begin or continue a re-examination of" those policies. Continuing Appropriations Act for the Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329-32. The Senate Appropriations Committee, the author of that prohibition, explained:

> The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority * * * audiences.

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). Congress has since extended the prohibition through fiscal year 1989, see Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, Tit. V, 102 Stat. 2216-2217 (1988), and has recently renewed that extension for the current fiscal year, 1990, see Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-1021 (1989).[7]

[7] On November 21, 1989, the President signed the appropriations provision into law. See also H.R. Conf. Rep. No. 299, 101st Cong., 1st Sess. 64 (1989); 135 Cong. Rec. H7644 (daily ed. Oct. 26, 1989); 135 Cong. Rec. S12,265 (daily ed. Sept. 29, 1989).

In recent years, Congress has continued to oversee the FCC's minority ownership programs. See, *e.g.*, *Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. Pt. 1, at 17-19, 75-77 (1987); *Minority-Owned Broadcast Stations: Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media: Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983). Following the decision in this case, Congress again held hearings to examine the current status of those programs. The Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation held hearings on September 15, 1989, to examine further the issue of minority ownership of broadcast stations. See *Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) (unpublished).

B. Proceedings in the Present Case

1. *The FCC's Initial Comparative Licensing Proceeding*

a. In 1982, following a rulemaking proceeding, the FCC assigned a new UHF television channel to Orlando, Florida. See *Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (New Smyrna Beach, Orlando, and Winter Park, Florida)*, 50 Rad. Reg. 2d (P & F) 1714 (1982). In 1983, petitioner Metro Broadcasting, Inc., a Florida corporation owned by nine men, four of whom are local residents and one of whom is black, Rainbow Broadcasting Company, a general partnership consisting of two women and one man, all of whom are hispanic, and Winter Park Communications, Inc., each filed competing applications with the FCC to build and operate that television station. The Commission

assigned the matter to an administrative law judge. Pet. App. 2a-4a, 81a-88a.

The ALJ granted petitioner Metro Broadcasting's application. *Metro Broadcasting, Inc.*, 96 F.C.C.2d 1073 (1983).[8] The ALJ found that petitioner deserved "a substantial comparative coverage preference over Winter Park," and that neither applicant merited a comparative preference for "diversification of mass media." *Id.* at 1088. Lastly, with respect to "integration of ownership," the ALJ found that petitioner was "entitled to full-time quantitative integration of 99%, while Winter Park is entitled to only a part-time 10%." *Ibid.*[9] The ALJ thus concluded that "on integration of ownership with management [petitioner] proves the clear and decisive winner [and that petitioner] is an overwhelming comparative winner over Winter Park." *Ibid.*

b. The FCC's Review Board reversed the ALJ's grant to petitioner and awarded the permit to Rainbow. Pet. App. 64a-93a; see *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688 (1984). The Board concluded, contrary to the ALJ's findings, that Rainbow was a qualified applicant, and thus proceeded to consider all three applicants' comparative credits. The Board gave petitioner a "79.2% full-time plus [a] 19.8% part-time quantitative integration credit" and awarded Rainbow a "90% full-time credit." Pet. App.

[8] The ALJ disqualified Rainbow for "misrepresent[ing] decisionally significant facts in [its] integration proposal." 96 F.C.C.2d at 1087. The ALJ also determined that neither petitioner nor Winter Park was entitled to a "decisionally significant" Section 307(b) preference. 96 F.C.C.2d at 1088; see note 1, *supra*.

[9] The ALJ also pointed out that several factors "strengthened" petitioner's quantitative assessment: several of petitioner's principals were local residents active in Orlando civic activities; one principal had broadcast experience; and a minority principal held roughly 20% of the firm's stock. 96 F.C.C.2d at 1088.

86a. The Board gave Winter Park only a 10% part-time credit, and thus chose not to consider Winter Park's enhancement credit. *Id.* at 86a-87a.

The Board determined that Rainbow was not only quantitatively ahead of petitioner (10.8% advantage), but also qualitatively superior because Rainbow was entitled to "a substantial preference for minority participation by 90% of its stock ownership * * * in contrast with [petitioner's] 19.8% credit [for minority participation]." Pet. App. 87a. The Board also gave Rainbow "a solid broadcast preference" because one of its principals' past broadcast experience was "much more significant" than that of petitioner's owners. *Ibid.* The Board concluded that

> although the qualitative comparison between Rainbow and [petitioner] is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage and solid broadcast experience preference, somewhat outweighs [petitioner's] local residence and civic participation advantage.

Id. at 88a.

c. In October 1985, the FCC denied both petitioner's and Winter Park's applications to review the Board's decision. Pet. App. 60a-63a. As a result, the Board's ruling became the FCC's final administrative decision under 47 U.S.C. 155(c)(3). Petitioner and Winter Park filed timely appeals from the Commission's decision to the District of Columbia Circuit.

2. *Initial Proceedings in the Court of Appeals and Administrative Proceedings on Remand*

a. The disposition of the appeals was delayed for several years because of events concerning related proceedings. In August 1985, the court of appeals held that the FCC had exceeded its statutory authority by adopting

a female preference in comparative licensing proceedings. *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985). On October 31, 1985, however, after the appeals in this case had been filed, the court of appeals, sitting en banc, granted a private party's petition for rehearing in the *Steele* case, vacated the panel's opinion, and, on November 22, ordered the parties to file supplemental briefs on the pertinent statutory and constitutional issues. In September 1986, the FCC filed a supplemental brief in the *Steele* case, stating that "the Commission believes that both [its] gender and racial preference schemes conflict with equal protection standards under the Constitution." Brief for FCC on Rehearing En Banc at 14, *Steele* v. *FCC, supra*. In light of its position, the FCC asked the court of appeals to remand the case to the Commission for further proceedings to explore the underpinnings of its policies. See Appendix to Brief for FCC on Rehearing En Banc, *Steele* v. *FCC, supra*.

On October 9, 1986, the court of appeals granted the FCC's motion for remand in the *Steele* case. And in December 1986, the Commission initiated a separate non-adjudicatory inquiry proceeding to consider the validity of its female and minority ownership policies. See *Re-examination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic, or Gender Classifications*, 1 F.C.C. Rcd 1315 (1986) (MM Dkt. No. 86-484), modified, 2 F.C.C. Rcd 2377 (1987). The Commission explained that, in light of recent developments in the law, it needed to reconsider both the factual and legal bases for the ownership policies. See 1 F.C.C. Rcd at 1317-1318.

b. As a result of the remand in the *Steele* case, together with the related developments, the FCC, joined in a separate motion by petitioner, asked the court of appeals to remand the record in the instant case in order for the

Commission to determine "whether the minority preference is of decisional significance in this proceeding." FCC C.A. Mot. for Remand 3. The court of appeals granted that motion in November 1986, and remanded the case to the FCC. Pet. App. 58a-59a.

On remand, the FCC concluded that "deletion of Rainbow's minority and female preferences could reverse the outcome of the case and result in an award to [petitioner]." Pet. App. 57a; see *Metro Broadcasting, Inc.*, 2 F.C.C. Rcd 1474, 1475 (1987) (MM Dkt. Nos. 83-140, 83-142, 83-143). The FCC therefore held the case in abeyance pending the outcome of its inquiry proceeding re-examining its minority ownership policies.

c. On December 22, 1987, the President signed into law the Continuing Appropriations Act for the Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, which, among other things, appropriated funds for FCC salaries and expenses for that fiscal year. That law provided that

> none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the [FCC] with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended * * *, which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

101 Stat. 1329-31.

The FCC complied with that legislation and on January 14, 1988, closed its inquiry proceeding and reinstated its policy of awarding gender and racial preferences in comparative licensing proceedings, and of preferring minority-controlled applicants in distress sales. See, *e.g.*, *Faith Center, Inc.*, 3 F.C.C. Rcd 868 (1988).

d. In February 1988, the FCC reaffirmed its earlier decision in this case awarding the permit to Rainbow and denying petitioner's competing application. Pet. App. 48a-51a; see *Metro Broadcasting, Inc.*, 3 F.C.C. Rcd 866 (1988).

On June 1988, by agreement of the parties, the court of appeals recalled the mandate and record of this case, and scheduled the case for oral argument in November. Pet. App. 6a.[10]

3. The Court of Appeals decision

A divided court of appeals affirmed. Pet. App. 1a-46a.[11] The court first determined that the constitutionality of the FCC's minority ownership policy was

[10] The FCC filed a supplemental brief defending, on both statutory and constitutional grounds, its policy of awarding merit to minority owners in comparative licensing proceedings. See Supp. C.A. Brief for FCC 28-47.

The United States, as amicus curiae, filed a brief contending that the FCC's "racial preference in its comparative process is unconstitutional." Gov't C.A. Br. 9. In light of this Court's then-pending decision in *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), however, the United States urged the court of appeals to defer its decision until the Court had resolved that case. Gov't C.A. Br. 10, 34-35.

[11] The court of appeals unanimously rejected Winter Park's claim that the FCC erred in refusing to award a dispositive Section 307(b) preference. Pet. App. 6a-10a; *id.* at 18a (Williams, J., dissenting on other grounds). That issue is not presented for this Court's review.

properly at issue because "the Commission found on remand that Rainbow's enhancement for minority ownership was probably dispositive." *Id.* at 10a.[12] The court then concluded that *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985), squarely controls, and thus the FCC's policy " 'easily passes constitutional muster.' " Pet. App. 10a (quoting *West Michigan*, 735 F.2d at 613).

In *West Michigan*, the court of appeals had upheld the FCC's policy for two principal reasons: first, the policy was not a rigid quota system, but rather "a consideration of minority status as but *one factor* in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters" (735 F.2d at 613); and second, in amending 47 U.S.C. 309(i) in 1982 to authorize the FCC to award minority preferences in lotteries, Congress recognized that the underrepresentation of minorities in broadcasting stemmed from racial discrimination, and thus "must be understood to have viewed the sort of enhancement used here as a valid remedial measure." 735 F.2d at 613-614.

The court concluded that *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), did not undermine the validity of *West Michigan* or call the FCC's minority ownership policy into question. *West Michigan* relied on *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), and *Regents of the University of Cal.* v. *Bakke*, 438 U.S. 265 (1978),

[12] The court of appeals declined to address the validity of the FCC's gender preference policy, because the FCC had "determined * * * that the outcome of the proceeding would not change even if no consideration were given to Rainbow's five percent female participation." Pet. App. 10a n. 5 (citing 3 F.C.C. Rcd at 876 n.1 (Pet. App. 49a n.1)). For that reason, petitioner errs in claiming (Pet. 11, 15-16, 21-22, 25-28) that this case presents an occasion for the Court to review the FCC's use of gender enhancements in comparative licensing proceedings.

neither of which was repudiated in *Croson*. Pet. App. 12a-13a. The court stated that Justice O'Connor's opinion for the Court in *Croson* "relied heavily on the reasoning of *Fullilove* and was careful to point out why the facts of [*Croson*] compelled a different result." *Id.* at 13a. Furthermore, the court found that "none of the opinions in [*Croson*] expresses any disagreement with *Bakke*, in which Justice Powell found racial diversity to be a constitutionally permissible goal, independent of any attempt to remedy past discrimination." *Ibid.*

Finally, the court found that *Croson* "stressed two crucial differences between the set-aside program upheld in *Fullilove* and the plan struck down in [*Croson*], and [concluded] in both respects [that] the FCC's policy is more similar to the *Fullilove* program found constitutional than to the [*Croson*] plan." Pet. App. 13a. First, the FCC's policy, like the program at issue in *Fullilove*, was flexible; the policy did "not involve any quotas or fixed targets whatsoever, and minority ownership is simply one factor among several that the Commission takes into account in the award of broadcast licenses." *Id.* at 13a-14a. Second, "[l]ike the set-aside plan in *Fullilove*, the FCC's minority preference policy has Congress' express approval." *Id.* at 14a.

Judge Williams dissented from the court's constitutional holding. Pet. App. 18a-46a. He concluded that this Court's recent decisions in *Croson* and *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986), "largely undermined" the validity of *West Michigan* and thus the constitutionality of the FCC's minority ownership policy as well. Pet. App. 18a. In his view, the FCC's asserted rationale for its policy—promoting diversity in programming—cannot survive *Croson*. See *id.* at 18a, 19a-30a. And, since the alternative justification—remedying prior discrimination, as allegedly mandated by Congress—was asserted only by

Rainbow, and not by the FCC, and may not even meet constitutional standards as articulated in *Wygant* and *Croson*, see *id.* at 30a-45a, Judge Williams believed that "the case should be remanded to the Commission for it to interpret Congress's directions." *Id.* at 19a.

On June 21, 1989, petitions for rehearing, together with suggestions of rehearing en banc, filed by both Winter Park and petitioner, were denied. Pet. App. 96a-97a, 98a-99a. Judges Silberman, Williams, D.H. Ginsburg, and Sentelle dissented from the denial of rehearing en banc. *Id.* at 98a-99a.

ARGUMENT

This Court is well aware that government-sponsored racial preference programs, like the Federal Communications Commission's policy of awarding a qualitative enhancement for minority ownership in comparative license proceedings, may involve important and sensitive questions of public policy and constitutional law. See, *e.g.*, *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *Regents of the University of Cal.* v. *Bakke*, 438 U.S. 265 (1978). Several considerations, however, suggest that further review of this particular case is not warranted at this time. Accordingly, we submit that review should be denied.

First, as petitioner correctly observes, this case is in many respects one of "first impression." Pet. 11. The decision below, apart from a different panel's decision in *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, 876 F.2d 902 (1989), petition for cert. pending *sub nom. Astroline Communications Co.* v. *Shurberg Broadcasting of Hartford, Inc.*, No. 89-700, is the first court of appeals

decision to apply this Court's analytical framework in *City of Richmond* v. *J.A. Croson Co., supra,* to a government-sponsored program involving a racial preference. Cf. *United States* v. *City of Chicago,* 870 F.2d 1256, 1261 (7th Cir. 1989). Thus, to the extent petitioner seeks this Court's review of the court of appeals' treatment of that decision as applied to a particular factual setting, see, *e.g.*, Pet. 14-19, 23-27, that request may well be premature pending further illumination in the courts of appeals.

Second, petitioner points out (Pet. 25-27) that the court of appeals' decision, together with the District of Columbia Circuit's earlier decision in *West Michigan Broadcasting Co.* v. *FCC,* 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1985), may not be squared with *Shurberg Broadcasting of Hartford, Inc.* v. *FCC,* 876 F.2d 902 (1989), petition for cert. pending *sub nom. Astroline Communications Co.* v. *Shurberg Broadcasting of Hartford, Inc.*, No. 89-700, decided by a different panel of the court of appeals. See note 6, *supra.* These cases pose no direct conflict, as each involved a distinct minority ownership program.[13] Nevertheless, they do rely on conflicting rationales and applications of this Court's decisions. In *Shurberg,* a divided court of appeals held that the FCC's minority distress sale policy, which permits a limited category of licenses to be transferred only to minority-controlled firms, violates the equal protection component of the Fifth Amendment. And in so holding, the *Shurberg* court flatly rejected the analyses used by both the majority

[13] Under the FCC's policy of awarding a qualitative enhancement for minority ownership in comparative licensing proceedings, the policy at issue in this case and *West Michigan,* the Commission takes minority status into account as one factor in a multi-factor comparative process. By contrast, under the FCC's minority distress sale policy, the policy at issue in *Shurberg,* the Commission permits a limited category of licenses to be transferred only to minority-controlled firms.

below and the *West Michigan* court to uphold the FCC's minority ownership policy in comparative licensing. See *Shurberg,* 876 F.2d at 902-903 (per curiam); *id.* at 910-926 (Silberman, J.); *id.* at 928-934 (MacKinnon, J., concurring in judgment).

That intra-circuit conflict does not call for further review by this Court. The Court has long followed the prudential practice of not stepping in to resolve such disputes. *E.g., Davis* v. *United States,* 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957). And the current status of the District of Columbia Circuit suggests that a departure from this Court's practice is especially unwarranted in this case. That circuit currently has three judgeships vacant; those vacancies are expected to be filled in the foreseeable future. Accordingly, once the court of appeals has its allotted complement of judges, and if issues surrounding the FCC's racial ownership policies persist, the entire court of appeals will be able to resolve any inconsistencies among panel decisions.[14]

Finally, as is apparent from the background of this case, see, *e.g.*, pp. 7-8, *supra,* both the FCC and the Congress have paid particular attention to and have closely monitored developments in this evolving area of law and public policy. The current state of affairs, which mandates the FCC's continued use of racial preference policies (subject,

[14] The particular Commission programs at issue in the conflicting panel decisions, moreover, affect only limited categories of licensing decisions—those generally involving applications for new stations on previously unoccupied frequencies or situations where the Commission finds it necessary to order a hearing on an existing licensee's qualifications to continue to broadcast. In addition, the peculiar regulatory background against which these programs were adopted, and the particular features of the programs involved, suggest that the panel decisions may well be of limited precedential significance for other sectors of the economy.

of course, to judicial review), stems from Congress's re-enactment of the annual appropriations provision. See p. 8 & note 7, *supra*. Accordingly, as the law now stands, Congress must reconsider the subject matter by the close of fiscal year 1990, and in fact has recently held hearings to examine the status and soundness of the FCC's minority ownership policies. See *Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) (unpublished); see also note 7, *supra*. In these circumstances, where Congress is revisiting this complex and sensitive area of the law, intervention by this Court at this time is not necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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